No. 18,503

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK PITTMAN, a minor, by and through his Guardian ad Litem MILAN L. PITTMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

EDWARD B. FREED
101 North La Brea Avenue
Inglewood, California 90301

Attorney for Appellant

No. 18,503

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK PITTMAN, a minor, by and through his Guardian ad Litem MILAN L. PITTMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

EDWARD B. FREED
101 North La Brea Avenue
Inglewood, California 90301

Attorney for Appellant

TOPICAL INDEX

(continued)

TABLE OF AUTHORITIES CITED

Codes

Texts

Rules

No. 18,503

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK PITTMAN, a minor, by and through his Guardian ad Litem MILAN L. PITTMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The real party in interest is 9-year old plaintiff and appellant (hereafter referred to as plaintiff), acting by and through his Guardian ad Litem, his father, Milan L. Pittman. Federal Rule 17c provides that an infant may bring an action through a Guardian ad Litem or next friend, and in no other way. The PETITION FOR APPOINTMENT OF A GUARDIAN AD LITEM OF A MINOR UNDER 12 YEARS OF AGE was filed in the United States District Court for the Northern District of California (R. T. 10), and petitioner-guardian was approved, and the Order approving petitioner as Guardian ad Litem of plaintiff-minor was made (R. T. 12).

A guardian having been duly appointed, the complaint on behalf of plaintiff-minor was filed (R. T. 4) and summons was issued thereon.

The Complaint seeks redress for personal injuries and damages suffered by plaintiff-minor by reason of acts, omissions, and the control and operation of real property, by defendant, and its agents.

The trial court had jurisdiction pursuant to 28 U. S. C. §1346(b), and under 28 U. S. C. §2401(a).

This is a multiple appeal from an Order and Judgment of Dismissal (R. T. 66, 67) entered November 27, 1962, which dismissed the plaintiff's complaint and action, and additionally quashed plaintiff's interrogatories and Notice of Depositions. This Order followed defendant's written Notice of Motion to Dismiss and Quash (R. T. 21, 24). The record indicates two Orders by the court, therefore, this is likewise a multiple appeal from the Order (R. T. 62, 67) granting the motions of the defendants to dismiss the complaint, and quash plaintiff's interrogatories and Notice of Taking Depositions, filed November 27, 1962.

This Court has jurisdiction under the provisions of 28 U. S. C. §1291.

STATEMENT OF THE CASE

FACTS

The judgment complained of is that of dismissal following a motion to dismiss; the facts before this Court are those contained

in the Complaint, the Petition for Appointment of Guardian, and the affidavit in response to the motion to dismiss. For purposes of this appeal, those facts therein alleged are deemed to be true.

United States v. Shubert, 348 U.S. 222, 225.

There are three factual situations in the pleadings; they present different questions of law; the facts affecting each particular question are in each instance separately set forth hereafter.

I

THE FIRST FACTUAL SITUATION AND QUESTION

A. The Verified Petition and Complaint Allege:

1. July 13, 1959, Mark Pittman was a minor under 10 years of age (R. T. 10).

2. That he lived with his father, Commander Pittman, mother, and three brothers and sisters in a house situated in the residential quarters for officers of the United States Naval installation at Vellejo, California, commonly known as Mare Island Naval Shipyard (R. T. 10, 5).

3. All of the roads, real property facilities and their improvements, were under the direct operation, control and jurisdiction of the United States Navy, an arm of the United States Government (R. T

4. The QUARTERS AREAS WERE SPECIALLY DESIGNATED FOR RESIDENTIAL PURPOSES; the children, including Mark, played in that area, including the roads, alleys, and by-ways (R. T. 5, 6).

5. Defendants knew this. All traffic conditions, including signs and routing, were under their control in this area (R. T. 6).

6. July 13, 1959, while Mark was playing in the residential area, a Navy motor vehicle driven by an authorized driver drove through the residential area and struck Mark (R. T. 6). That there were three, concurring, contributing causes of the accident, and consequent injuries (R. T. 6, 7). That the causes were:

a. The United States Navy as a landlord so negligently supervised, managed and controlled the physical area, in failing to provide signs, warnings and supervision, know children played in the area (R. T. 6);

b. Knowing children played in the area and roads, defendants were careless and negligent in routing motor vehicular equipment through the quarters (R. T. 7);

c. That the driver of the vehicle was careless under all the facts and knowledge (R. T. 6, 7).

Thus, there are two counts based upon a landlord-tenant relationship, and one count based upon the common law action of negligence.

7. The Complaint alleges three separate duties on the part of defendant (supra), particulars where each duty was breached (supra), personal injury and property damage, and proximate cause.

8. NO CLAIM ON BEHALF OF MARK WAS EVER MADE TO THE NAVY OR ANY OTHER AGENCY OF THE GOVERNMENT PRIOR TO THE DATE OF FILING SUIT.

9. On December 18, 1961, which was within six years

after the accident and injuries complained of, Commander Pittman was first appointed guardian ad litem of Mark, and the petition and Order were filed (R. T. 10-12).

10. Concurrently with the Order appointing Commander Pittman guardian ad litem, the Complaint of record was filed on December 18, 1961 (R. T. 4-9).

11. The Petition and the Complaint were filed within six years of the date of the accident, and were intended at that time to constitute a claim against the United States Government. Nothing in the pleadings discloses any prior claim having been made or filed, and nothing discloses any previous action by a guardian ad litem or next friend on behalf of Mark prior to the date of the filing of the Complaint.

12. Notice of the claims contained in the Complaint and the Complaint itself were given to the United States Government on December 20, 1961 by the serving upon the government of a copy of the Summons and Complaint in the action (R. T. 13 - reverse side).

13. August 2, 1962, interrogatories were served on defendant (R. T. 14-17), and on August 10, 1962, depositions were noticed (R. T. 18-20).

14. August 17, 1962, defendant filed and served motions to dismiss the Complaint and quash the other proceedings (R. T. 21-25).

15. November 27, 1962, the motions were granted in two separate Orders (R. T. 62-67).

B. Question Presented By These Facts

1. Where an infant minor has suffered personal injury and property damage and loss proximately consequent upon wrongs done by the government and its agents in the course of their authority; and, where, prior to filing the Complaint, said minor was at all times under a legally imposed disability by reason of his minority so that he could neither make claim nor file a civil action on his own behalf; and, where no tort claim was ever made prior to the date of filing civil action by anyone on his behalf to the United States Government or any agency thereof; and where, for the first time, concurrently with filing suit, and as a condition precedent to such filing, a guardian ad litem was appointed to represent the minor in the prosecution of said civil action; and, where the guardian was appointed, and the Complaint was filed, within six years of the date of the wrongs complained of; and, where said Complaint and the claims against the government set forth therein were first served upon and made to the government within six years of the date of the wrongs complained of: then, in such case, does the civil action constitute a claim for wrongs done and damages suffered, pursuant to 28 U. S. C. §1346(b) and 28 U. S. C. §2401(a) so that the District Court wherein the same was filed has jurisdiction to hear and determine the causes of action therein alleged upon their merits and render a judgment on the merits?

II.

THE SECOND FACTUAL SITUATION AND QUESTION

A. The Second Factual Situation

1. On October 15, 1962, plaintiff filed an Affidavit in response to the motions to dismiss and quash (R. T. 40-50). The Affidavit set forth the facts recited hereunder.

2. Commander Pittman and his wife had several children; he was a Commander in the United States Navy and the Navy was his career; he was concerned that if litigation were commenced against the government it might harm his career and that in so doing, there would be harm to his entire family, including his wife and three other children, and their financial security would be endangered.

3. Therefore, no matter how valid a claim Mark might have, and regardless of how good the possibility of recovery might be, his primary concern was as a father, husband and was for the security of the family as a whole.

4. That as a father, it was his intention to make every personal provision for Mark's future that he could; but at the same time, he felt that he had to balance the future of his wife and other children against that of Mark and that it was a matter of great concern as to any "possible litigation from the standpoint of how it would affect Commander Pittman's future, his earnings and his ability to provide for the family as a whole", this would have to be his first consideration.

5. As of September 11, 1960, the date of interview of affiant with the Commander, more than a year had elapsed since the accident but nothing had been done, because of the concern of Commander Pittman with the family and his career and "the possible adverse effect litigation might have".

6. On January 12, 1961, the Commander actually signed the petition to have himself appointed as guardian. (At two places, R. T. 11 and 12). The petition was part of an entire pleading including the Complaint and he read the Complaint at that time.

7. That however, by reason of his fears of adverse effect upon his career, he directed the Complaint be not filed until a determination had been made on his selection by the Navy to promote him to Captain.

8. That as a result, the Petition, Order and Complaint were not filed until more than two years from the date of the accident. That actually they were filed and made after he was appointed a Captain.

9. That he was not concerned any longer with litigation affecting his career and the security of the family because he did not believe there was any higher position he might thereafter be appointed to.

B. The Question Involved

In its Order, the Lower Court gave as a ground that 28 U. S. C. §2401(b) controlled; that this acted as a statute of limitation, and that since the Complaint had not been filed within the two year period provided for in §2401(b), therefore, the Court had to dismiss the

Complaint and grant the motions to dismiss and quash on the grounds that it lacked jurisdiction.

This question will only arise contingent upon this Court's consideration and determination of the preceding question. If the Court rules that the preceding question should be answered in the affirmative, and the Court had jurisdiction, this question becomes superfluous.

The fact that these questions are raised is not intended in any way to indicate that plaintiff does not believe he is entitled to the relief as provided under the first question.

The question herein presented involves two aspects:

a. Where a minor is under a disability imposed by law, and the control of his representation to make a claim or file a lawsuit is in the hands of a third party who suffers a conflict of interest, and as a result a case is not filed nor a claim made until more than two years from the date of the wrongdoing, in such case does the trial court have jurisdiction of the subject matter and the causes of action therein so that plaintiff is entitled to have a trial on the merits?

b. By reason of the fact that there was no one to act for the minor, and he could not legally make a claim prior to the time of prosecuting the cause of action, and a claim could not therefore "accrue", as distinct from a right of action accruing, does §2401(b) have any application at all?

III

THE THIRD FACTUAL SITUATION AND QUESTION

A. The Facts.

The Affidavit referred to is set forth for the facts as follows:

1. That the Commander's attorney had sought information and advice from the United States Deputy Attorney's office in Los Angeles, advising a particular Deputy of all the facts above, and had inquired with respect to the statute of limitations, venue, damages, etc.;

2. That the United States Deputy Attorney in several calls had advised affiant that there was a disability provision, that the statute was a two year statute plus the disability provision;

3. That affiant relied thereon in the handling of the matters involved.

4. That the attorney had even read to affiant the law and explained the meanings of the sections involved, and affiant relied upon this as upon the word of an expert.

5. That by reason of such reliance, affiant, since the minor was so young, did not concern himself with any possibility of a two year statute at all operating so as to foreclose the filing of a cause of action.

B. The question Involved Herein Is:

Under the facts recited, the Deputy Attorney General being an officer of the United States Government, does this constitute estoppel against the government so that assuming for the purpose of this

question, §2401(b) did apply, it would not be assertable as a defense and that, therefore, the District Court would have jurisdiction and plaintiff be entitled to go to trial on the merits of the case recited in the Complaint?

IV.

AS TO THE INTERROGATORIES AND MOTIONS:

Since the rulings of the lower court with respect to these, were entirely dependent upon the motions to dismiss being granted, plaintiff will not go into these matters, since if the trial court is reversed, plaintiff will ask that in the reversal, the Order contain provision for proceeding with the interrogatories and depositions.

SPECIFICATION OF ERRORS

A. The first question to be resolved on appeal:

The trial court erred in dismissing the Complaint on the basis of lack of jurisdiction.

B. The second question to be resolved on appeal:

The trial court erred in dismissing the Complaint on the grounds recited in its Order, that it had no jurisdiction due to the application of a two year statute of limitations under 28 U. S. C. §2401(b), or at all.

C. The trial court erred in finding there were not facts constituting an estoppel as against the government, and by reason of failing to find an estoppel, ordering the Complaint dismissed.

D. The Orders quashing the interrogatories and notices of motion to take depositions are in error by reason of the error of

the court in the foregoing particulars and questions.

MATTERS OF JUDICIAL NOTICE

The following facts are extracted from "STATISTICAL ABSTRACT OF THE UNITED STATES, 1962", published by the United States Department of Commerce, Bureau of the Census, the NATIONAL DATA BOOK AND GUIDE TO SOURCES, 83rd Ed.

The 1960 population of the United States comprised 183, 285, 009 persons.

Of this amount 108, 861, 000 were over the age of 21.

74, 424, 009 were, therefore, under the age of 21.

THUS, MORE THAN 40% OF THE POPULATION CONSISTS OF "PERSONS" UNDER AGE 21.

The projection statistically made at page 6 indicates that the percentage of those under 21 will increase between 1960 and 1970.

Page 6 disclosed that in 1960 there were 20, 318, 000 children under 5 years of age; 18, 789, 000, 5 to 9 years of age; 16, 985, 000 between 10 and 14 years; and, 13, 424, 000 between the ages of 15 and 19 years. Thus, it is a subject of judicial notice that the percentage of the population consisting of those under the age of 21, will be consistently increasing in the future. There are 5 years involved in those within the 15 to 19 bracket. Taking 20% of the 13, 000. 000 figure for those 19 years of age, there were approximately 2, 700, 000 19 year olds at the time the cause of action alleged in the Complaint in this case took place. Taking the 11, 137, 000 20 to 24 years of age,

covering a 5 year span, and taking 20% of that figure, we find there were approximately 2,220,000 20 year olds at the time the causes of action set forth in the Complaint herein took place.

The purpose of these statistics is to establish that as the law was interpreted, and applied, by the lower court, the following facts are facts:

1. That as to 74,000,000 plus persons including plaintiff, over 40% of the population, then under age 21, they are denied a remedy granted by law to all others; thus denied life, liberty and property, potentially, by being denied the privileges, immunities, equal benefit and equal protection of the laws of the United States because, in each instance, such persons, in order to obtain the benefit of a remedy, would be entirely dependent upon some third person, their whims, caprices, self-interest, conflicts of interest, and the will of each, as to whether they would or would not have any right to redress; that, in fact, the dependency upon the third person for access to a remedy, is by reason of the laws of the governments themselves (Federal and State) which do not permit them to proceed to make a claim or file a civil action in their own behalf.

The additional importance of these statistics, addressing ourselves to the 19 and 20 year olds, is to establish that even within the groups of those under age 21, there is a variation in the inequality. Depending entirely upon whether a person is 19 years plus one day, with succeeding variations up to 20 years and 364 days, the minors within that age group have access to the courts directly, or to make

their own claim directly, anywhere from one day for a person 19 years and one day of age at the time the wrong occurred, up to one year, 364 days for a person 20 years and 364 days of age at the time the wrong accrued.

The statistics cited thus support the conclusion: under the application and interpretation of the laws by the lower court, there is inequality upon inequality with resultant variations of the availability and denial of a remedy to those under 21, including plaintiff.

It is the position of the plaintiff in this case, and he so urges this Court, that this could not possibly have been the intention at any time of Congress in granting a right to persons to obtain redress directly for wrongs done them by the government.

ADDITIONAL QUESTION INVOLVED

Plaintiff's position in this appeal is that by reason of the language of 28 U. S. C. §1346(b) the DOCTRINE OF SOVEREIGN IMMUNITY has no application. However, in some of the appellate cases, where 28 U. S. C. §2401(b) was considered, there was reference to the DOCTRINE OF SOVEREIGN IMMUNITY either as one of the bases for denying the right to prosecute a civil action for wrongs done by the government, or as the sole basis for denying or limiting the right to prosecute a civil action for wrongs done by the government.

If this Appellate Court considers it necessary to take into consideration the Doctrine of Sovereign Immunity, in such case plaintiff raises the additional question:

That the doctrine itself as applied herein is unconstitutional. It denies to the plaintiff the privileges and immunities and equal protection of the law he is entitled to, thus depriving him of life and property without due process of law. That as between his rights under Article IV and the Fifth Amendment and the application of the Doctrine, his rights are paramount. That Congress has the sole power to legislate and has done so in this instance.

Finally, the doctrine itself may be violative of the Constitution.

SUMMARY OF ARGUMENT

FIRST QUESTION

Where a guardian ad litem as required by Federal Rule 17(c) is appointed to represent an infant minor, and files a complaint, setting forth causes of action for wrongs done to the minor by the government; and the complaint alleges duties, breaches of duties, negligence, accident, personal injuries and property damage, and proximate cause; and no demurrer, general or special, is filed to the complaint; and the complaint was filed within six years of the date of the wrongdoing by the defendant government; and no previous claim on behalf of said minor had ever been made to the government or any agent thereof with respect to the wrongdoing; in such case, the United States District Court has exclusive jurisdiction to hear and determine the cause of action, and the claims for redress in the causes of action, and to do so on their merits; and a refusal to exercise such exclusive jurisdiction and to hear and determine the matters alleged

upon their merits, violates due process of law as to that plaintiff.

A.

THE UNITED STATES DISTRICT COURTS HAVE EXCLUSIVE JURISDICTION OVER CIVIL ACTIONS FOUNDED UPON A CLAIM FOR PERSONAL INJURIES AND PROPERTY DAMAGES RESULTING FROM WRONGDOING BY THE GOVERNMENT.

By specific statutory direction, Congress gave authority to the District Courts of the United States to exercise exclusive jurisdiction over causes of action sounding in tort. 28 U.S.C. §1346(b) provides:

> ". . . the district courts, . . . shall have exclusive jurisdiction of CIVIL ACTIONS 'ON' CLAIMS against the United States, FOR MONEY DAMAGES . . . FOR INJURY OR LOSS OF PROPERTY, OR PERSONAL INJURY . . . CAUSED BY THE NEGLIGENT OR WRONGFUL ACT OR OMISSION of any employee of the Government while acting within the scope of his office or employment, UNDER CIRCUMSTANCES WHERE THE UNITED STATES AS A PRIVATE PERSON, WOULD BE LIABLE TO THE CLAIMANT IN ACCORDANCE WITH THE LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED." (Emphasis added).

The Act was without historical precedent. The courts have construed its intent, and application. The purposes of the Act were: (a) to afford relief directly to a person injured by permitting him to file a civil action against the government and claiming relief therein for damages to property or person; (b) and providing that the government would be treated as a private person as a defendant in such civil action in determining the government's liability. In Somerset v. United States (1951), 193 F. 2d 631, it was stated:

"THE ACT (28 U.S.C. 1346(b)) MUST BE GIVEN A LIBERAL CONSTRUCTION TO WARD OFF THE OBVIOUS EVIL WHICH THE ACT WAS PASSED TO PREVENT - THE CUMBERSOME AND UNWIELDLY PRACTICE OF SEEKING RELIEF IN CONGRESS BY PRIVATE BILLS." (Emphasis added).

In Jones v. United States (1954), 126 F. Supp. 1010, the court stated:

"In construing the Federal Tort Claims Act, it must be borne in mind that it is a remedial statute intended to waive the sovereign immunity of the United States to suit in tort. Unlike the other statutes that submit the United States to suit, the Federal Tort Claims Act should receive a liberal construction in the light of its beneficent purpose." (Emphasis added).

So, too, in McNamara v. United States (1961), 199 F. Supp. 879, the court stated: "THIS STATUTE (F.T.C.A.) SHOULD RECEIVE A LIBERAL CONSTRUCTION."

B.

"CIVIL ACTIONS 'ON' CLAIMS FOR MONEY DAMAGES FOR INJURY OR LOSS OF PROPERTY, OR PERSONAL INJURY CAUSED BY THE NEGLIGENT OR WRONGFUL ACT . . ." OF THE GOVERNMENT, MEANS:

A LAWSUIT FILED IN THE DISTRICT COURT WHICH CLAIMS BY ITS ALLEGATIONS THAT THE PLAINTIFF IS ENTITLED TO RECOVER MONEY DAMAGES FOR LOSS OF PROPERTY OR PERSONAL INJURY, as the case may be.

The phrase "CIVIL ACTION" means a lawsuit.

Black's Law Dictionary, 4th Ed., 312, 313:

"In general, an action wherein an issue is presented for trial formed by averments of complaint and denials of answer or replication to new matter.

"an adversary proceeding for declaration, enforcement or protection of a right, or redress, . . .

"Both actions at law and actions in equity."
citing Kleipinger v. Rhodes, 140 F. 2d 697, 698, 78 U. S. App. D. C. 340.

"In the Civil Law, a personal action which is instituted to compel payment . . ."

"At Common Law, One who seeks the establishment, recovery or redress of private civil rights. ('one' meaning action)."

The statute uses the word "actions" and "claims" plurally. The plural of "claims" has reference to the statute providing that there could be various claims, or one claim, thus: For injury or loss of property; or personal injury; or death, all in one action?

The plural of "actions" of course means more than one action; this would be where they are separately stated in separate suits, or separate and distinct causes of action stated in a single suit.

As used in this Act, the word "ON" means "UPON", which is its most common use as a preposition, and the first choice as a synonym for the word "ON".

Black's Law Dictionary, 4th Ed., 1240.

Webster's New International Dictionary, 2d Ed. Unabridged, at page 1701, gives various examples with respect to the significance of the word "ON" as a preposition. The first is an example where something is dependent upon something else by reason of its position of contact with the thing that supports it; the second example given

is "indicating contiguity or dependence"; an example thereunder is "d. indicating a basis or ground of action, award, opinion, reliance, etc.". For example, "to rely on one"; ". . . by reason or virtue of . . .".

Thus, giving the words of the statute their reasonable and ordinary and customary meaning, the phrase "civil actions on claims for money damages for injury or loss of property, or personal injury caused by the negligent or wrongful act" of the government, means when referring to a single lawsuit or action filed in court:

> THE DISTRICT COURTS HAVE EXCLUSIVE JURISDICTION OF A CIVIL ACTION WHICH DEPENDS FOR ITS EXISTENCE AS SUCH ACTION UPON ALLEGATIONS RECITED THEREIN WHICH SHOW THEREBY THAT THE PLAINTIFF IS MAKING A CLAIM FOR MONEY DAMAGES FOR LOSS OF PROPERTY OR PERSONAL INJURY BY REASON OF SOME WRONG INFLICTED UPON PLAINTIFF BY THE GOVERNMENT OR ITS AGENCIES.

In the singular, the statute would read that the District Courts have exclusive jurisdiction "OF A CIVIL ACTION FOUNDED UPON A CLAIM AGAINST THE UNITED STATES, FOR MONEY DAMAGES, ... FOR INJURY OR LOSS OF PROPERTY, OR PERSONAL INJURY, OR DEATH CAUSED BY THE NEGLIGENT OR WRONGFUL ACT OR OMISSION ..." etc. of the government.

If the civil action was not based upon a claim of wrongdoing by the government, then the court would have no jurisdiction, other than such jurisdiction as may have been conferred upon the District

Courts by 1346(a) and (1) and (2).

In United States v. Yellow Cab Co. (1950), 340 U.S. 543, the court held that the meaning of the word claim, under §1346(b) included ANY CLAIM ... ON ACCOUNT OF PERSONAL INJURY; further holding that these are BROAD WORDS IN COMMON USAGE AND NOT WORDS OF ART.

C.

THE COMPLAINT ALLEGES A "CLAIM ON ACCOUNT OF PERSONAL INJURY ARISING OUT OF THE WRONGDOING(S) OF THE GOVERNMENT AND ITS AGENT IN ACCORDANCE WITH 28 U.S.C. §1346(b)".

The word "claim" can be either a noun or a verb. In the statute it may be interpreted or applied in either manner. Whether a verb or a noun, it is immaterial, because the end product is the same.

As a verb, Webster's New International Dictionary, 2d Ed., Unabridged, page 493, shows that claim as a verb is a word of action: "to ask for, or seek to obtain, by virtue of authority, right, or supposed right; to demand as due"; "to assert as a fact, right, or relation which ought to be acknowledged or conceded"; "to ask or call for; to require; to demand; to be entitled to"; ... "to assert, maintain; -- a loose use. Colloq."

As a verb intransitive, it is defined as "to call; to call or cry out", or "to deduce a right or title; to have or assert a claim".

As a synonym it is "claim, assert, maintain".

If the word is to be used as a noun, then: "a demand of a right or supposed right; a calling on another for something due or supposed to be due"; "a right to claim something".

If the word is used as a noun, then there must be a "claimant". And at page 493, this is defined as "one who claims; one who asserts a right or title". As examples, at page 494, of the meaning of a claimant in law, we find: that a party in an action asserting a claim is a claimant.

Under common and ordinary usage, whether as a verb or noun, the Complaint in this case sets forth a claim for wrongdoing by the government and asks for money damages. The Complaint in and of itself is a claim. The plaintiff in this case, acting through a guardian ad litem, is a claimant. The plaintiff, claimant, claims wrongdoing by the government, and claims he is entitled to money for the wrongdoing for the property damage and injuries suffered.

In the authoritative WORDS & PHRASES, Vol. 7, "CLAIM" is defined:

> "A claim is, 'in a just juridical sense', a demand of some matter of right made by one person upon another to do, or to forbear to do, some act or thing as a matter of duty."
>
> Citing many cases, including Prigg v. Commonwealth, 41 U.S. (16 PET.) 539, 615, 10 L. ed. 1060; United States v. Spaulding, 13 N.Y. 357, 360, 3 Dak. 85; and others.

or, at 457:

> "In its ordinary sense, a 'claim' imports the assertion, demand, or challenge, of something as a right . . ."

Fordyce v. Goodman, 20 Ohio St. 1, 14.

The distinction between a "claim" and a "civil action" rests on the fact that the civil action may include a "claim" through instituting suit, as opposed to a mere demand made by one person upon another. Where a "civil action" is commenced, setting forth a cause of action stating a duty, breach, accident, injury, damages and proximate cause, AND CLAIMING PLAINTIFF IS ENTITLED TO MONEY DAMAGES AS A MATTER OF RIGHT -- THIS MOST CERTAINLY CONSTITUTES A "CLAIM", and when that action is served upon the defendant, a "claim" through civil action has then been made upon such defendant, or a civil action ON a claim has been made.

Although a "claim" may or may not constitute an "action", the word "action" automatically includes a "claim".

Ehte v. State, 23 N.Y.S. 2d 616, 260 App. Div. 511.

That is the situation in this case.

D.

FOR A CLAIM TO BE MADE, LEGAL CAPABILITY IS REQUIRED, I.E., THERE MUST BE SOMEONE THE LAW PERMITS TO MAKE A CLAIM.

Inherent in the legal and ordinary meanings of the word "claim", as a noun, are several factors. These include the capability of the claimant to make a claim; for, without a claimant there is no claim. A discussion of the capability of a claimant to make a

claim, as a condition precedent to the existence of a claim, is found in Kocourek, JURAL RELATIONS, 2d Ed., page 7, with introduction by Wigmore (published by Bobbs-Merrill Co.). He states:

> "A claim is a legal capability to require a positive or negative act of another person; an immunity is a legal capability to prevent a positive or negative act of another; a privilege is a legal capability to decline an act toward another; and a power is a capability to act with a legal effect toward another."

Continuing at page 10:

> "5. There are only two ultimate jural relations. (1) Reciprocation - According to the above table there appear to be four fundamental types of jural relation, but a closer examination of the matter shows that there are in fact only two fundamental types -- claims and powers."
>
> "Immunity is only the reciprocal of claim, . . ."

Continuing at page 15, §8: There are illustrations that if one has not the power to make a claim THEN THERE IS NO CLAIM -- SINCE THE POWER TO COMPEL PERFORMANCE IN THE COURTS IS FUNDAMENTAL TO THE CLAIM. A CLAIM IMPLIES THE FREEDOM AND POWER TO EXERCISE THE SAME.

E.

FOR A CLAIM TO BE MADE, THERE MUST BE SOME WORD OR ACT SHOWING AN INTENT TO MAKE A CLAIM.

In Cable v. United States, C. C. A. ILL. 104 F. 2d 541, 545, it was held that to constitute a claim within the World War Veterans Act there must be words showing an intention to claim in order to constitute a claim.

Where a letter did not advise that a claim was being presented or asserted, it was held not to be a "claim" under the War Risk Insurance Act.

Cannon v. United States, D. C. Pa., 45 F. Supp. 106, 108.

F.

WHERE A CIVIL ACTION IS BASED UPON A CLAIM THAT THE GOVERNMENT DID WRONG AND THEREFORE CLAIMS MONEY DAMAGES FOR SUCH WRONGDOING RESULTING IN INJURY TO PROPERTY AND PERSON, THE APPLICABLE STATUTE OF LIMITATION IS 28 U. S. C. §2401(a).

---

28 U. S. C. §2401 reads:

"Time for commencing action against UNITED STATES. (a) EVERY CIVIL ACTION COMMENCED against the United States shall be barred unless the complaint is filed within six years after the RIGHT OF ACTION ACCRUES." (Emphasis added).

The statutes does NOT SAY "EVERY CIVIL ACTION 'EXCEPTING' A TORT ACTION": NOR does it say "EVERY CIVIL ACTION 'EXCEPTING' ONE CLAIMING RELIEF OR REDRESS". The Statute says, "EVERY CIVIL ACTION . . .". And, plaintiff urges that EVERY means EVERY.

By "EVERY CIVIL ACTION . . ." as stated in 28 U. S. C. §2401(a), the statute refers to those actions wherein the United States is a defendant. These are found under 28 U. S. C. §1346 and consist of:

"(1) Any civil action ... 'for the recovery of internal revenue taxes, etc.' "

"(2) Any other civil action or claim ... not exceeding $10,000 founded upon the Constitution, act of Congress, etc."

IT IS TO BE NOTED THAT UNDER THE SUBSECTION (2) REFERRING TO "ANY OTHER CIVIL ACTION ...", SUBSECTION (b) IS FOUND. Thus, §1346(b) is specifically within the definition of the civil actions to which 28 U. S. C. §2401(a) applies.

As to the date such action is barred, the language is explicit: Unless the complaint is filed within six years after "the right of action accrues".

The "right of action" is "the right to bring suit; a legal right to maintain an action, ..." (Black's Law Dictionary, 4th Ed., 1488). Under Federal Rule 17c a minor cannot bring suit excepting through a guardian ad litem with the Court's Order and Consent. However, when such giardian is appointed, suit can be instituted. The right of action is the date one can legally act on his own behalf.

Thus, an infant has no right of action, and cannot be a claimant on his own behalf; until the appointment of a guardian under Rule 17c, he has no capability to make a CLAIM (supra).

CONCLUSION

Where a civil action is founded upon a claim of wrongdoing by the government or its agents acting in the course of their authority, and sets forth that by reason of such wrongdoing the plaintiff is entitled to money damages for injuries and property damage suffered proximately consequent upon such wrongdoing, this constitutes a civil action or a claim within the meaning of 28 U. S. C. §1346(b), by definition. It is an assertion of a right for redress by one who claims he was wronged.

Tested by the law, the definitions, the meanings of the words involved, it can be stated that the Complaint of record claims money damages for injury to person and property arising out of the wrongful acts or omissions of the government by its agents acting in the course and scope of their authority to act. The claimant, formally, is the guardian because Mark, age 9, could neither make nor file a claim or an action by law.

Mark was injured July 13, 1959. He could neither make nor file a claim on his own behalf. He had no right to commence an action on his own behalf. No claim was ever filed for him other than through the filing of the instant Complaint. No one was authorized by law to act for him as a guardian ad litem prior to filing this Complaint.

Within six years of the accrual of "the right of action" under 28 U. S. C. §2401(a), a guardian was appointed in accordance with the law to exercise the right of action. The right of action came into

being at the time the guardian was appointed. Because, by definition, Black's Law Dictionary, 4th Ed., page 1488, the "right of action" is "the right to bring suit; a legal right to maintain an action, . . ."

The Complaint in and of itself constituted a claim (noun) and was an act of "claiming" (as a verb) and thus came squarely within the meaning of 28 U.S.C. §1346(b). It became a completed claim in so far as notice to the government was concerned at the time of service of process, which was likewise within the six-year period of 28 U.S.C. §2401(a).

The court below erred in dismissing the Complaint on the grounds that it did not have jurisdiction of the subject matter, or upon the grounds that it did not set forth a claim over which the court had jurisdiction, or upon any grounds whatsoever.

The words "EVERY CIVIL ACTION . . ." which commence 28 U.S.C. §2401(a) include a tort action; there is no exception in the statute set forth or noted.

Under the factual situation presented, the Complaint, being a civil action setting forth a claim for money damages for wrongs done by the government causing personal injury and property damages, the statute of limitations applicable, to repeat -- to determine whether such action was timely commenced, was 28 U.S.C. §2401(a).

The refusal of the court below to take jurisdiction, to hear and determine the claims set forth and alleged against the government, and determine the same on their merits, was without legal authority, and constituted a denial to the plaintiff of the remedy provided by law for wrongs done him by the government, and thus resulted in a

deprivation of life, liberty or property without due process of law pursuant to Article IV, and the Fifth Amendment to the Constitution of the United States, by depriving plaintiff of a remedy given by law to all persons upon an equal basis.

It is respectfully submitted that judgment should be reversed with instructions.

STATEMENT PRELIMINARY TO PRESENTATION OF ARGUMENT AND LAW AS TO QUESTIONS ON APPEAL (OTHER THAN IN THE FIRST QUESTION [SUPRA]).

Plaintiff does not intend to admit that his contentions set forth above are in any way qualified, modified or affected by reason of pursuing the Appeal through the QUESTIONS subsequent to the FIRST QUESTION (I).

PLAINTIFF'S POSITION IS UNIFORM THROUGHOUT THIS APPEAL - THAT IS TO SAY: THE ONLY STATUTES OF REMEDY AND LIMITATION HAVING APPLICABILITY TO THE FACTS IN THIS CASE ARE AS RECITED IN THE FIRST QUESTION (supra).

THE SECOND QUESTION PRESENTED ON APPEAL (II SUPRA)

It is plaintiff's contention as set forth in THE FIRST QUESTION (SUPRA), that 28 U. S. C. §2401(a) is the only applicable and controlling Statute of Limitation for the time within which "EVERY CIVIL ACTION (which includes a tort action), may be commenced.

The only reason for proceeding with a consideration of the

ADDITIONAL QUESTIONS SET FORTH ABOVE (II, III, etc.), arises out of the ORDERS of the Court below reciting 28 U.S.C.A. §2401(b) to be the Statute of Limitation applicable; so that, under the facts presented, the Court determined it was without Jurisdiction, and dismissed the action.

SUMMARY OF ARGUMENT-SECOND QUESTION

WHERE:

1. The Government tortiously injures a minor, age 9, and he thereby suffers personal injury and property damage within 28 U.S.C. §1346(b); and

2. By Federal and State Law he is incapable to make a claim or file a civil action on his own behalf because he legally lacks capacity; and

3. By Federal and State Law, each Government respectively reserves to itself the right: a. TO APPROVE OR DISAPPROVE ANY PETITION FOR SOMEONE TO BECOME A GUARDIAN AD LITEM; and b. THE RIGHT TO APPROVE OR DISAPPROVE WHAT SUCH GUARDIAN DOES AS A GUARDIAN; and

4. There is no one, BY STATE OR FEDERAL LAW OBLIGATED TO MAKE A CLAIM OR FILE SUIT ON BEHALF OF SUCH MINOR UNTIL APPOINTED BY THE COURTS THEMSELVES; and

5. Access to the remedy provided can only be had; as a claimant or plaintiff, THROUGH a GUARDIAN AD LITEM appointed

for the purpose; and

6. THERE IS NO ONE OBLIGATED BY LAW TO EITHER FILE AN ADMINISTRATIVE CLAIM ON MINOR'S BEHALF, OR TO PETITION TO BE GUARDIAN AND FILE SUIT, AND, UNTIL A GUARDIAN IS LEGALLY APPOINTED, THE MINOR HAS NO RECOURSE FOR REFUSAL BY HIS PARENTS OR ANYONE ELSE TO DO THOSE ACTS REQUIRED BY STATUTE TO BE DONE AS A CONDITION PRECEDENT FOR RESTITUTION TO THE MINOR; and

7. Where the persons, designated by law as those having preference to represent the minor, refuse to do so because of valid conflicts of interest; and the law does not give the minor a right of action or remedy for losses suffered by such refusal; and

8. Where, as a result of the refusal to act and represent the minor, by those BY LAW given preference so to do; and the Laws do not permit claims or actions reciting claims to be filed by a minor on his own behalf; and the minor is BY THE GOVERNMENT ITSELF DENIED ANY REMEDY PROVIDED FOR OTHERS UNTIL SUCH TIME AS SOMEONE LEGALLY QUALIFIED IS LEGALLY APPOINTED TO ACT FOR HIM (THUS HE HAS NO RIGHT OF ACTION IN HIMSELF AT ANY TIME); and

9. Where a legal representative is first appointed more than 2 years after the date of wrongdoing, injury and damages, and concurrently files a civil action on behalf of the minor; and

10. Where NO PRIOR CLAIM, ADMINISTRATIVE OR THROUGH CIVIL ACTION HAD BEEN MADE PRIOR TO THE

FILING OF THE CIVIL ACTION; and

11. Where the CIVIL ACTION RECITED THE GOVERNMENT HAD WRONGED THE MINOR, INJURED HIS PERSON AND DAMAGED HIS PROPERTY RIGHTS, AND CLAIMED DAMAGES THEREFOR:

THEN, UNDER THE FACTS RECITED, LEGAL RELATIONSHIPS INVOLVED, and the Laws of the United States and in equity, 28 U. S. C. §2401(b) has no application; is NOT a statute of Limitation on such Civil Action, and the District Courts have and will exercise jurisdiction to hear and determine the claims as alleged in the Complaint on their merits.

That refusal to take and exercise jurisdiction, by application of §2401(b) as a Statute of Limitation, or FOR ANY OTHER REASON, denies to plaintiff minor the privileges and immunities guaranteed to him under Article IV of the Constitution, and he suffers a loss of person and property together with denial of equal protection and equal benefit of the laws - so that under the FIFTH AMENDMENT TO THE CONSTITUTION he is denied life, liberty and property without due process of law.

I.

28 U.S.C. MUST BE CONSTRUED IN ITS ENTIRETY WITH 28 U.S.C. §2401 CONSTRUED IN ITS ENTIRETY, INSTEAD OF IN SUCH A PIECEMEAL MANNER THAT ONE CLAUSE OF LIMITATION APPLICABLE TO A STATED MATTER, STANDING ALONE, DESTROYS CLEARLY STATED RIGHTS AND REMEDIES IN A PRECEDING CLAUSE - AND THIS WOULD NOT OCCUR IF SUCH STATUTE WERE CONSTRUED IN ITS ENTIRETY

The provisions of §2401(b) cannot be fairly and justly applied to those rights and remedies found in §1346 unless §2401(b) is read and construed together with §2401(a). In fact, §2401(b) has no application to §1346(b).

Chief Justice Warren better stated the proposition in Richards v. United States (1962), 82 S.Ct. 585; 369 U.S. 1, 7:

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act,"

and that in fulfilling our responsibility in interpreting legislature,

> "we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy."

The stated purpose of §1346 is to delineate the jurisdiction of the respective courts, District and Claims, as recited therein, and to classify by name those specific matters over which each court would have jurisdiction. The Statute MUST be read and construed in its entirety, with the understanding that where certain words are used, IT WAS INTENDED, that those words should

determine the nature, intent and application of that claim; that those who used those words, used them in their ordinary meaning and not as "words of art" and intended so to use them and did not intend the words to mean something other and different than the meanings they would ordinarily have and thus, result in a denial and frustration of the intent of the statute, or of the particular subdivision thereof.

28 U.S.C. §1346 GRANTS REMEDIES AND THE MEANS & RIGHT OF ACCESS TO THE REMEDIES. It carefully distinguishes the remedies and carefully separates the means whereby such remedies are obtainable (i.e. separately stated jurisdiction of each court).

28 U.S.C. §1346 is intended to and does set forth which courts shall have jurisdiction of which remedies in those instances where the "UNITED STATES (is) DEFENDANT".

THE VERY FIRST PHRASE OF §1346, CONTEMPLATES THE UNITED STATES AS A DEFENDANT. Thus, Civil action on claims for relief is inherent in the Act.

Next, §1346(a) provides:

> "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
> "(1) Any civil action . . . having application to recover of money from Internal Revenue; (giving the right of direct action against the government in two different Courts, at the option of the taxpayers).
> "(2) Any other civil action or claim . . . NOT EXCEEDING $10,000." (Emphasis added).

arising out of a variety of situations, THIS SPECIFICALLY EXCLUDES

"CASES NOT SOUNDING IN TORT." (Emphasis added).

Subsection (2) contains three important designations:

1. CIVIL ACTION;

2. CLAIM; and

3. CASES.

There is a careful distinction between "CLAIM" and "CIVIL ACTION" - used in the alternate, each as a noun - and this refers to the fact the Court of Claims has concurrent jurisdiction with the District Courts - thus the rationale for giving the Court of Claims concurrent jurisdiction is made clear (As in subsection (1) preceding where the ordinary procedure for recovery of funds from Internal Revenue is to first make a written claim therefore).

As to the clause at the end of (a), (2), that the Concurrent Jurisdiction of the Court of Claims DOES NOT EXTEND TO "CASES ...." .... SOUNDING IN TORT, there can be only one explanation consistent with the exclusion: It was the Intent of Congress to make other provision for civil actions, i. e. CASES SOUNDING IN TORT; and, IT WAS THE FURTHER INTENT THAT THE COURT OF CLAIMS NOT HAVE JURISDICTION OF SUCH CIVIL ACTION i. e. CASES The word cases in this context must, of necessity, mean a law suit, which is, of course, a civil action.

The foregoing is established in the next succeeding Section of the Act, i. e. §1346(b) (and it is respectfully urged that it be noted that this subsection of the Act has EQUAL DIGNITY AND IS NOT AFFECTED BY THE FIRST SUBSECTION.

It is reasonable to state in reading §1346(a) and §1346(b) it was the intent of the act that CASES SOUNDING IN TORT was to be a separate class of CASES.

The phraseology, meaning and intent of §1346(b) was gone

into exhaustively in the FIRST QUESTION (supra).

For purposes of the instant QUESTION, the following extraction is made therefrom:

> "§1346(b) . . ." . . . the district courts . . ." . . ." . . . shall have EXCLUSIVE JURISDICTION OF CIVIL ACTIONS ON CLAIMS . ." . . ." . . . FOR MONEY DAMAGES . ." . . ." . . . for injury or loss of property, or personal injury or death caused by the negligent act or omission . . ." etc., . . ." . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
>
> "CLAIMS FOR MONEY DAMAGES FOR WRONGS" by CIVIL ACTION, is the essence of §1346(b).

It is immediately noted that the Court of Claims has NO JURISDICTION. JURISDICTION IS CONFERRED UPON A COURT WHERE A TRIAL BY JURY MAY BE HEARD; A COURT ACCUSTOMED TO LITIGATION BY PARTIES INVOLVING ALL TYPES OF CLAIMS, INCLUDING A HEAVY PERCENTAGE OF TORT CLAIMS BETWEEN PRIVATE CITIZENS. JURISDICTION IS CONFERRED ON THAT COURT WHICH, BY ITS VERY NATURE, BACKGROUND AND EXPERIENCE, IS BEST QUALIFIED AND ABLE TO HANDLE LITIGATION IN THE NATURE OF TORT SUITS. It is reasonable to infer that the language in §1346(a) (2), whereby CASES IN TORT were specifically excluded, was because CASES IN TORT, i. e. CIVIL ACTIONS BASED UPON OR ARISING OUT OF A CLAIM OF WRONGDOING BEING SET FORTH IN THE COMPLAINT, WERE INTENDED TO BE HEARD AND DETERMINED BY THE DISTRICT COURT EXCLUSIVELY.

Without repeating the definitions and authorities set forth in

FIRST QUESTION (supra), and construing the statute in its entirety, it becomes clear that the purpose and intent of §1346(b), in the light of §1346(a) WAS: TO MAKE AVAILABLE TO A LITIGANT DIRECT ACCESS TO THE DISTRICT COURTS, THROUGH FILING A CIVIL ACTION WHEREIN A CLAIM WAS ALLEGED FOR MONEY DAMAGES FOR WRONGDOING.

It is important to note what the section DOES NOT SAY: THERE IS NOWHERE TO BE FOUND ANY REFERENCE TO "A CLAIM" separately classified as being other than a CIVIL ACTION, as in (a) (2); nor is there any jurisdiction conferred upon a Court of Claims, which would, in the most logical manner be mush concerned if the remedy was to sue on a "claim" (noun). In subsection (2) a "claim" is formal assertion in writing to a governmental body.

CIVIL ACTION CLEARLY IS THE MEANS CONTEMPLATED where the provision states that the United States will be liable to the claimant IN ACCORDANCE WITH THE LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED. Plaintiff knows of no state where relief is obtainable from a private person by merely making a written or oral "claim" advising such private person of the position of the claimant. In EVERY STATE AND TERRITORY, INSOFAR AS THIS PLAINTIFF HAS KNOWLEDGE, CLAIMS AGAINST PRIVATE PERSONS FOR TORTS AND DAMAGES CONSEQUENT THEREON ARE MADE ONLY THROUGH THE FILING OF A CIVIL ACTION (Workmen's Compensation Acts have no application, because the liability therein is imposed by reason of the relationship involved WITHOUT REGARD TO WRONGDOING).

THUS, the conclusion: Reading §1346 IN ITS ENTIRETY, discloses that §1346(b) created and conferred a remedy by providing direct CIVIL ACTION in the District Courts, WITHOUT THE NECESSITY OF AND WITHOUT RESPECT TO THE MAKING OF ANY OTHER OR DIFFERENT FORMAL CLAIM PRIOR TO THE COMMENCEMENT OF SUCH A CIVIL ACTION.

28 U.S.C. 2401

Section 2401 states: "Time for commencing ACTION against United States". (Emphasis added). There are two subdivisions, (a) and (b).

(a) states: "EVERY CIVIL ACTION COMMENCED SHALL BE BARRED UNLESS THE COMPLAINT IS FILED WITHIN SIX YEARS AFTER THE RIGHT OF ACTION ACCRUES."

The second sentence of §2401(a) states: "The action of any person under legal disability or beyond the seas AT THE TIME THE CLAIM ACCRUES may be commenced within three years after the disability ceases."

Under FIRST QUESTION (supra) the definitions of CIVIL ACTION, and "right of action" by established legal authority was exhaustively treated.

This is a statute of Limitation SPECIFICALLY PHRASED SO AS TO APPLY TO "EVERY" civil action i. e. a lawsuit as distinct from a mere claim. Of necessity, it applies to CIVIL ACTIONS under §1346(b). There are no words excepting CIVIL ACTIONS in

§1346(b) from the application of §2401(a); and, as pointed out previously respectfully, 'EVERY' can only mean 'EVERY' meaning WITHOUT EXCEPTION. EVERY MEANS ALL!!

The right to commence action within six years of the accrual of the "right of action" is absolute. The "right of action" previously defined CANNOT ACCRUE TO A MINOR UNTIL A GUARDIAN IS APPOINTED FOR HIM OR UNTIL HE REACHES AGE 21, because there is no "right of action" until one can exercise it (supra). A person under a disability has no "right of action".

The second sentence of §2401(a) (supra):

a. the word 'action' as used therein refers back to "CIVIL ACTION" at the start of the paragraph, thus: 'action' equates 'civil action'. The phrase, 'claim accrues' can only mean "at the time the cause of action accrues".

Thus, cause of"action accrues" and "claim for wrongdoing accrues" are synonymous in meaning under §2401(a).

In each and every instance, the word "claim" does not refer to a formal writing. It refers to the allegations in a Complaint setting forth a cause of action: Thus, as in §1346(b) - a claim FOR DAMAGES FOR WRONGS (TORTS).

SECTION 2401(b)

Section 2401(b) states:

> "A 'tort claim' against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of

enactment of this amendatory sentence, ... etc. ..." Going on to state: "... if it is a claim not exceeding $1,000, it is presented in writing to the Appropriate agency within two years after such claim accrues ..." etc. .. Then, second sentence ... "If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency, etc. ... suit thereon shall not be barred until ..." different time limits.

An examination of the legislative history of this second clause, together with its language as clearly discloses:

a. This refers to tort CLAIMS (noun - a writing or claim) made to the government;

b. The tort Claims, are administrative claims made to agencies;

c. THIS CLAUSE WAS MERELY A RESTATEMENT OF A NUMBER OF PRECEDING CLAUSES DATING BACK MANY, MANY YEARS BEFORE THE ENACTMENT OF §1346(b) AND WAS INTENDED TO APPLY TO ADMINISTRATIVE TORT CLAIMS AND TORT CLAIM PROCEDURES PREVIOUSLY ESTABLISHED; AND TO ESTABLISH TIME LIMIT FOR SUIT AFTER SUCH CLAIMS WERE AND EITHER DENIED OR NOT ACTED UPON; AND

d. It has NO reference or Meaning with relation to §1346(b), which relates to CIVIL ACTIONS, and has no relationship or meaning to §2401(a) which addresses itself to CIVIL ACTION .... It has no more affect on §2401(a) than §1346(b) has on §1346(a);

e. The word "claim" as used in §2401(b) is a noun; the word 'tort' is an adjective. As a noun, it is governed by the law with with respect to its common usage as a noun (see FIRST QUESTION, supra).

f. As to the meaning "claim accrues" under this subsection, two possible means suggest themselves:

1. "... the right to ..." make a claim accrues;

2. There is two years after presenting the claim to the Federal agency within which to commence action thereon; thus, 'claim accrues' would mean the date of filing or presentment of the claim would atart the period of limitation within which action could thereafter be commenced on the claim.

In addition to the authorities cited under FIRST QUESTION, supra, in Volume 1, Bouvier's Law Dictionary, 3rd Ed., at page 501, it states:

> "Claim" "In a popular sense, claim is a right to claim. The assertion of the liability to the party making it to do some service or pay a sum of money."

At page 502,

> "Claimant" "A person authorized and admitted ... etc. (Reference to a claimant, for example, in admiralty practice. There is no other example given.)"

At page 111, the word "accrue" ... "TO BECOME A PRESENT RIGHT OR DEMAND, ...". That it is to say, a claim accrues after such claim has become A PRESENT RIGHT OR DEMAND. For example, a cause of action accrues at the time suit may be brought for a breach of contract. This example is set forth as an example of the word "accrue".

Since a minor has neither a "right to claim" or a "right of action", and cannot be a "claimant" and as to him a claim could not accrue until "such claim became a present right or demand", it automatically follows that under the language of §2401(b), an action

could not be brought on a "tort claim" and a tort claim could not "accrue" to a minor until after he became 21 years of age. Thus, in addition to the fact that §2401(b) is so worded as to indicate administrative claims and would have no application anyhow to a minor, §2401(b) is impossible to apply to a minor because a claim cannot accrue so as to bring an action thereon with respect to the minor until after age 21. Therefore, under the factual situation presented in this case, assuming for purposes of argument that §2401(b) might be applicable, it automatically follows that since a claim accrues as to a minor after he has a right to make a claim, and he is by reason of legal disability or incapacity unable to make a claim prior to age 21, automatically under §2401(b) he would have two years within which after he reached the age of 21 to make a claim, because at age 21 his right to make a claim as well as his ability to make a claim accrues.

However, despite the fact that §2401(b) has no application for the foregoing reasons, it further has no application because §2401(b) cannot alter or modify §2401(a). They have two different intents, purposes, and applications.

It is clear that §2401(b) is merely a section which was amended and which applied previously to administrative tort claims because prior to that time there was no right to bring a civil action directly without first making a claim. The only change or modification in §2401(b) is the change to increase the time within which action is to be commenced after the filing or making of such a claim and the extension was to two years instead of the previously existing one year.

g. By its own definition, §2401(b) is merely a revision of a provision for limitation on bringing actions on written tort claims previously made to the various agencies of the government.

It is neither proper, legal nor possible to take out of part of a sentence that which a person desires to take and apply it without reference to the rest of the sentence itself. It should not be done as to an entire paragraph, or an entire Act, as stated by Chief Justice Warren, above. It becomes even more of an offense against the intent of the Act to take a phrase out of context.

Section 2401(b) specifically states, without interruption, that the clause is a "amendatory sentence". It amends the clause as it previously existed in applying to tort claims, that is to say, written documents or written claims. It has not application to §2401(a) at all. In fact, it can be found that in the same sentence with reference to "a tort claim" it refers to claims not exceeding $1,000.00, presented in writing to the appropriate "federal agency" within two years after such claims accrues or "within one year of the date of the enactment this amendatory sentence, whichever is later". It goes on to refer to claims under $1,000.00. It then clearly indicates that the intent is to limit the time to bring action on a claim in its formal sense after the claim is presented.

II.

A CIVIL ACTION ON A CLAIM FOR WRONGDOING, IS NOT THE SAME AS SUING IN AN ACTION ON CLAIM, EVEN THOUGH SUCH LATTER CLAIM MAY BE FOR WRONGDOING.

A civil action in itself automatically includes a claim. Claim
n this sense is the allegation contained on it upon which relief is
ought. A civil action on a claim is governed by the rules and regula-
ons with respect to the filing of a lawsuit, discovery proceedings
ereunder, and the well established rules of evidence with respect
ereto. For example, if, during the course of the civil action, a
erson desires to amend to state other claims for injury, or to change
e claim for money damages, even during the trial itself, this relief
an be afforded by proper motion.

However, contrast this with a situation where the action is on
e claim, as an administrative claim. In such case the plaintiff
ould allege that he had presented a claim, that it either had not been
cted on or had been disallowed within the statutory period for the
ame, that by reason of the foregoing he was now instituting suit on
e claim itself. In such case he would be limited in procedure and
recovery by the matters contained in the claim. He could not
lter or modify this nor would the Court have jurisdiction so to do.
e would be limited in his recovery to that which had been set forth
n the claim itself.

III.

BY §1346(b) THERE WERE ALTERNATIVE REMEDIES PRESENTED TO A CLAIMANT (PLAINTIFF IN A CIVIL ACTION, OR CLAIMANT ON FILING AN ADMINISTRATIVE CLAIM).

As stated above, the intent of §1346(b) was to provide direct access to the courts to relieve Congress of various bills, and petitions.

Thus, by the enactment of §1346(b), it is not possible to state that the rules and regulations with respect to making claims for relief under the ADMIRALTY ACT, or some other Act, was eliminated. This right to make claim continued to exist, side by side with the right to proceed directly in the District Court itself, setting forth the wrongdoing as a cause of action and asking for relief under §1346(b).

Thus, an additional purpose of §1346(b), apparently, was to present to the public, alternative remedies.

If it was a small matter, or even a large matter, the public was placed in the position where, assuming a right to make a claim in the sense of the person having capacity, over age 21, a person could make a claim to the federal agency involved - in this case, the Navy. If a person cared to exercise that right, the person then would be governed thereafter by §2401(b). In such case, it might have been that the person would save attorney fees, court costs, time would be saved, all the intricacies, uncertainties, and delay of federal court procedure, would be avoided. It becomes a simple, relatively inexpensive matter.

However, assuming that a person did not want to make a claim

to the particular agency involved, or that the claim was so large that the person did not feel that the agency either would act thereon, or possibly the authority to the agency to act would be limited, in such case the person had a right to retain counsel and proceed with a civil action setting forth the claims with respect to the wrongdoing of the government and the damages suffered. This method of procedure is lengthy, involved, expensive, uncertain. Nevertheless, it served the specific purpose.

Thus, there can be no other conclusion except that the §2401(a), had application directly with respect to exactly what it says, "every civil action", whereas §2401(b) was s statute of limitations with the right to commence an action within that period of time after the right or ability to make a claim to the particular agency involved, in the particular amount authorized by law for that agency to dispose of, accrued to the individual. Under any circumstances, a claim could not accrue to a minor because he lacked legal capacity to make a claim, and for the courts to hold that a "claim accrues" when a person cannot exercise such a claim is a legal anomaly.

For example, under the Cable case (above at page 23), it specifically states the requirements as condition precedent to there having been a claim. These requirements are that the claim must show an intention to claim. That is to say, that in order to be a claim there must be words showing an intention to make a claim. The case holds that there can be no action on a claim unless there are first words showing a claim was intended to be made. The case holds that where a letter did not state it was intended to be a claim,

it could not be a claim. It is therefore impossible for §2401(b) to be applicable to a minor.

The phrase "claim accrues" within §2401(b) has a totally other and different meaning than the same phrase in §2401(a).

There is an additional reason why a "claim accrues" and "§2401(b)" cannot have application to a minor. A minor has no right to the property resulting from loss of earnings during infancy. He not only lacks capacity to make a claim for the same, but the right of property until age 21 is in his parents. They are entitled to the services and earnings until age 21. How, therefore, can a minor make a claim, or how, therefore, can a "claim accrue" to a minor until he has reached that age where the law says he has the right to the thing itself? It follows that if he has no right to damages, he never had a claim accrue with respect to himself; if he has no right to the product of his services and earnings, he did not have any claim accrue so as to be entitled to redress for the loss of the same. The Complaint in this action does not ask for the loss of earnings to the parent as a result of the wrongdoing, the Complaint in this action asks for anticipated damages with respect to the minor. That is to say, it is not a claim for that which by right the minor is entitled to as a matter of law, it recites an anticipation that after the age of 21, the minor will suffer loss of property by reason of damages in the nature of earnings denied him. The courts permit such an action, upon proof and evidence presented that he will suffer loss of earnings <u>after</u> age 21. This does not make the claim accrue to him as of this time, it is an <u>anticipated</u> claim and an <u>anticipated</u> accrual upon proper

evidence being presented.

IV.

A READING OF §1346(b) TOGETHER WITH §2401(b) AND IGNORING §2401(a), REACHES A CONTRADICTORY CONCLUSION.

Section 1346(b) refers to civil actions and only to civil actions. There is no reference therein as to administrative claims. The history and background of §2401(b), its amendments, and the references therein to federal agencies, etc., clearly establish that it has reference to "tort claims" in the sense of administrative claims. There is nothing in §2401(b) that mentions civil actions for wrongdoing and the recovery of damages therefor. By applying §2401(b) as a limitation on §1346(b), a violation of due process results in an unusual application, in that the right to commence a civil action as a claim is totally eliminated and a party is limited in its recovery, and limited in its lawsuit in court, to that particular specific claim which it may theretofore have made to an administrative agency. Thus, in the instant case, by applying §2401(b) and ignoring §2401(a), we reach the following incongruous result: Let us assume that through the plaintiff guardian, after proper appointment, he had made a claim to the Navy in the amount of $10,000.00, at a time where the results of the accident were not certain and the nature and extent of the injuries and property damages were uncertain. Let us assume then that within a two year period thereafter, the Navy not having acted or having rejected the claim, the guardian, still acting in his

appointed capacity, filed suit on the claim itself. However, during the interim, it became established that the minor had suffered a permanent injury, and had suffered future losses of earnings and property as a result. What rights and remedies would there be available under this circumstances?

The answer is apparent. The minor would be limited in the extent of his recovery, by the claims that had been made on his behalf as presented to the federal agency. This certainly is not the intent of an act giving a right of direct action, which in itself confers the right to modify, alter, or amend the allegations therein during the course of time awaiting trial. Thus, by applying §2401(b) as a limitation on §1346(b), due process of law in the sense that the plaintiff would have lost the right to amend, modify, and make motions with respect to the cause of action recited, would have been lost and denied to the plaintiff.

Most certainly this would violate the statement of Chief Justice Warren in Richards v. United States (supra), where, pages 13 and 14, he states:

> "Nor are we persuaded . . ." . . "the liability of the United States is not co-extensive with that of a private person under the state law."

Under state law there is a direct right to suit, and a right to amend and to modify and to ask for greater damages and to claim relief once suit has been brought. Under state law a private person would be liable as defined by those rights in a suit. The application of §2401(b) would limit the individual to the allegations set forth in the formal claim to the government. This could not have been intended

as being the limit of liability of the United States under §1346(b).

V.

AN INTERPRETATION AND APPLICATION OF §2401(b) AS THE STATUTE OF LIMITATIONS WITH RESPECT TO §1346(b) DENIES TO PLAINTIFF THE PRIVILEGES AND IMMUNITIES OF THE LAW, AND DENIES TO PLAINTIFF THE EQUAL PROTECTION OF THE LAW, SO AS TO DENY HIM LIFE AND PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OR ARTICLE FOUR AND THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, IN SEVERAL RESPECTS.

The foregoing statement is made upon the assumption that §2401(b) is being construed as the sole statute of limitations with respect to §1346(b).

Plaintiff stipulates that if in the instant case the "claim" in the administrative sense had been made to the Navy prior to filing suit, by a qualified representative having capacity to make such claim, instead of as the facts shown in the Complaint and affidavits of record, the plaintiff would be limited in his recovery to the matters recited in the claim and would be limited to the two year statute within which to file action on such a claim. The facts show otherwise here. Plaintiff lacked capacity, a claim could not accrue as to the property damage until age 21, and the other facts are all before the Court as well.

In the present case there was no prior tort claim made to the government and its administrative agencies. It is doubtful whether such a claim would have been valid because there is nothing

to indicate that the Navy would have any right or privilege to settle a claim in the amount of the damages set forth in the Complaint, and a claim would have been a nullity. There is no one by law who could make a claim or who had a right to claim on the minor's behalf, so a claim could not have accrued until the appointment of somebody acceptable by the law and to the law to act for him.

Under the facts disclosed, the filing of the civil action constituted the making of the claims within §1346(b) and the statute of §2401(a) was applicable, having reference to the matters recited therein as set forth above.

An excellent example of this situation is set forth in the case of United States v. Wade (1948), 179 F. 2d 298. A husband and wife were injured when their auto was struck by a military vehicle. At the time the Federal Tort Claims Act was not in effect. (That is to say, §1346(b)). They filed a claim under the MILITARY CLAIMS ACT, which had permitted claims to be made to the military for no more than $1,000.00 for a plaintiff for property damage and medical care, for wrongs done by the military. It did not permit recovery for personal suffering and pain. Therefore, the plaintiffs were limited in that which they could obtain by the law with respect to the claim that could be made to the military. The accident did occur within that period of time to which §1346(b) was made retroactive. Having filed a formal claim under the Military Claims Act, the plaintiffs then filed a civil action for additional damages.

The court specifically held that the Military Claims Act settlement was a bar to further action based upon injury to person

or property, BUT DID NOT BAR AN ACTION FOR PAIN AND SUFFERING AS THERE COULD BE NO RECOVERY FOR PAIN AND SUFFERING UNDER THE PHRASEOLOGY OF THE MILITARY CLAIMS ACT ITSELF. Thus, a civil action for pain and suffering under the 1346(b) section was proper.

This is exactly what the plaintiff in this case urges. That §2401(b) has application to military claim. There was none filed, there was no one capable of filing. Thus, there was a right to a civil action under §1346(b) at the time it was made.

In Patitucci v. United States)1959), 178 F. Supp. 507, where a plaintiff filed a claim with the Post Office under the particular provisions he was permitted to, the question arose as to whether or not the claim had been timely filed. There was indication in the case by the language of the court that the term "claim" as used in §2401(b) refers to claims made to an administrative agency.

The purpose of a statute of limitation is to avoid "stale claims" under 28 U. S. C. §1346(b). In Hungerford v. United States (1961), 192 F. Supp. 581, the court stated:

> "The principal purpose of a statute of limitations is to protect defendants against stale and unjust claims, ..."

There is no Act known to the plaintiff herein and no case law which states that the purpose of a statute of limitations is to apply in such manner as to deny the remedy itself. But, if §2401(b) is construed to be the sole statute of limitations applicable to §1346(b), then, as to more than 40% of the population, this is the actual result, since under no circumstances can a claim accrue to a minor until he

has capacity to act on his own behalf. Thus, unless some beneficent individual volunteers, and this assumes a state of knowledge and willingness, to act for the minor, the remedy of §1346(b) is totally unavailable to him unless, by accident of birth, he is between the age of 19 and 21 at the time the wrongdoing occurs and he has knowledge with respect to the cause of action itself, such as in the Hungerford case, supra, where it was held that a claim accrues when discovered.

Both the federal and state government by law impose conditions precedent upon minor's right to redress and restitution.

A minor has no "rights" in the sense of capacity or ability to assert a claim or to file an action. This is not of the minor's own doing. This is the law. Under Federal Rule 17c the Courts are not accessible to him until a guardian ad litem is appointed to act. Thus, the federal government itself is the ultimate guardian in that it has the right to approve or disapprove of the application of a guardian. It is inequitable and unjust for the government to furnish a remedy on its face, and reserve to itself the ultimate approval as to whether or not that remedy will be made available solely by reason of the disability of the minor which is imposed upon the minor by the government itself.

The only duty of a parent to a minor child is that of maintaining and supporting the child. There is no duty for a parent on behalf of a minor child to bring an action on his behalf. The right of action is permissive. For example, in the Code of Civil Procedure of the State of California, §376, the maintenance of a civil suit on behalf

of a minor is phrased permissively, "The parents of a legitimate, unmarried child, acting jointly, may maintain an action....". There is no positive duty so to act, there are no cases that say there is a positive duty to act. Thus, there being no positive duty upon the parents to act, there is no remedy available to the minor child as against his parents, for their wilful failure or refusal to act.

Thus, as to 40% of the population, including plaintiff, under 21 years of age, they are totally helpless, do not have access to a remedy that is available to all persons over the age of 21, and is even available to those between 19 and 21 on a variable basis depending upon how many days after they reach 21 the two-year time limit under §2401(b) would expire. This could not have been the intent of the law. To interpret and apply §2401(b) and ignore §2401(a) which solves this problem, is a denial of the privileges and immunities to a minor and the equal protection of the laws to a minor, that is available to all persons over the age of 21, and thus violates the Constitution in the loss of life or property without due process of law.

Further examination of this question discloses that in California under §1406 of the Probate Code of the State of California, a minor "over 14" may nominate his own guardian. This is subject to §1406.5 and the provisions of §1402, which state that a parent may appoint a guardian by will or by deed (which is not the case herein), but which clearly indicates the helplessness of the child in the face of the parental act.

Only under §1409 of the Probate Code is there any indication of relief for a minor as against a parent. That section provides that

a parent who knowingly or wilfully abandons or fails to maintain his minor child under 14, forfeits all right to be guardian.

Thus, a minor has no rights. In fact, the guardian has no rights. In fact, the only ultimate authority with respect to that which the minor can do is the government itself. Section 1432 establishes that the guardian receiving money on behalf of the minor has to account to the minor at age 21.

Under §137.1 of the Civil Code we find that the sole right of relief of a minor as to his parents is to bring an action through another guardian ad litem in the Superior Court where the father or mother having the duty to provide for the support, maintenance and education of the child wilfully fails to do this.

Thus, under the law, the only duty of a parent is that of support, maintenance and education -- this does not include the duty to bring a lawsuit and it is the government who has failed to provide such a duty, and the government should be estopped to assert a statute whereby it benefits in its own wrongdoing by being able to deny to a minor any remedy against a third person where no one acts for the minor.

In 37 Cal. Jur. 2d 151, under the title PARENT AND CHILD, we find that the parental "right" with respect to the minor is actually only a privilege. Section 17 states:

> Whenever conditions are shown to be such, by reason of the delinquency or mental or moral limitation of parents, that to allow their child to continue in their custody would endanger its permanent welfare, their right (that is, to have custody and control of the child) must give way, its preservation being of less importance than the health, safety, morals, and welfare of the child. IF THERE EXISTS SUCH

DERELICTION OF PARENTAL DUTY AS NECESSITATES TAKING A CHILD FROM THE CUSTODY OF PARENTS, THE STATE, AS SUPERPARENT . . ." can to what it wants. (Emphasis added).

So a parent not only does not have the duty to sue for a child, but the parent is actually not even the ultimate guardian of the child. The state is the ultimate guardian of the child.

Where a child is injured the damages go to the parents until the child is 21; thus, 37 Cal. Jur. 2d at page 205, with relation to tort actions against a third person, it states that the parents' right to the service and earnings are a valuable property right -- and a wrongful injury to the child will support an action by the parent for loss of those rights as against the third person. THIS IS SEPARATE AND DISTINCT FROM WHATEVER RIGHT OF ACTION THE CHILD MAY HAVE FOR DAMAGES AFTER IT REACHES 21.

The only right an injured child has is found at Volume 37, Cal. Jur. 2d, page 209, where again, an action by the parents as guardian for the child, is found to be only permissive. And at page 215, it states:

> "Where injury to a child results in its permanent or indefinite disability, the loss by the child of the ability to perform labor and earn wages during the period of minority is an item of damages belonging to the parents rather than to the child, A CHILD'S RIGHT TO DAMAGES AT THIS TIME BEING CONFINED TO THE PERIOD FOLLOWING MAJORITY." (Emphasis added).

Thus, the liability of the government under §1346(b) as a private individual, would not come into being with respect to a claim on behalf of a child, and the claim could not accrue to the child on

his own behalf, until the child reaches age 21. It is the state law which determines the right to the property and damages, and not the federal law under the statute itself. Thus, to artibrarily apply §2401(b) as a statute of limitations when a claim could not be made by the child, when there was no claim accrued to the child, when there was no damage accrued to the child unless it was anticipatory damage which would accrue at age 21, clearly denied to the child the privileges and immunities of the Constitution, and the equal protection of the law, and it results in a denial of due process by failing to give him the same rights other persons have under the law. The only solution in a case where a minor is involved, if §2401(b) is going to be the applicable statute, is to recognize the fact that regardless of the provisions of the statute, a claim cannot accrue to a minor until age 21, and therefore the claim not accruing until age 21, the child had two years from the date the "claim accrues" under §2401(b) to bring an action, unless prior to age 21, a person who by law is appointed to act for him either files a claim with the administrative agency, or files a civil action. Any other result would be inconsistent with the intent of §1346(b).

An excellent statement of law on this same position is in Doyle v. Loyd, 45 Cal. App. 2d 493, 497. In that case two of the plaintiffs were minors and the defendants made a motion that the causes of action of the two minors be stricken from the pleadings. The motion was denied and the court's ruling was assigned as error on appeal. It was held that "the statutes regarding the appointment of guardians ad litem were enacted for the purpose of protecting the

minors and not for the purpose of precluding them from their legal rights. The defendants cite no case that holds to the contrary." (Emphasis added).

Under the laws of the State of California, and this is a substantive right and not a procedural right, it holds, at 26 Cal. Jur. 2d, under title INFANTS, Capter 8, "Actions by And Against Infants", §35 at page 678:

> "A minor may enforce his rights by civil action or other legal proceedings, in the same manner as a person of full age, EXCEPT THAT A GUARDIAN MUST CONDUCT THE LITIGATION." (Emphasis added).

Thus, a minor cannot conduct or enforce his rights as other persons, until a guardian is appointed, under state law, as well as under federal law.

The law is well settled that a guardian ad litem is not the representative of the minor, but is the representative of the Court.

See, Estate of Cochems (1952), 110 Cal. App. 2d 27;

Serway v. Galentine (1946), 75 Cal. App. 2d 86.

The United States Courts have long since decided that the United States Government itself has that power with respect to a minor which supersedes the control of the parents, and their rights of the parents. In United States v. Williams (1937), 302 U. S. 46, 58 Sup. Ct. 81, it states:

> "The power of the United States may be exerted to supersede parents' control and their right to have the services of minor sons who are wanted and fit for military service."

It can be concluded that the governments are the "parents prafriae" of a child. They have the ultimate guardianship over the person and property of a person under a disability. Ordinarily, the exercise of this function is within the jurisdiction of the states (Hoadly v. Chase, 126 F. 818 (affirmed 129 F. 1005 MEM, 64 CCA 319). However, under the Selective Service Act, and where a minor has a remedy for wrongs done him by the government, this parental or superparental control is in the hands of the government itself. For the government to state that a child can only act through a guardian, then give no relief to a child where there is no guardian to act, and those who ordinarily would act cannot act by reason of their conflicts of interest, effects an unjust and inequitable result, and is violative of due process as stated. For a remedy under §1346(b) available to all persons, to be denied to more than 40% of the population, or placed upon such a basis where their possibility of recovery and restitution for wrongs done by the government are dependent upon the will, whim, caprice, self interest, or possible conflicts of interest of those whom the government specifies shall be the only ones to act for them, is so inequitable, unequal, and unjust in the face of the intent of the remedy, as to deny due process. There could be no such intent under §1346(b) to operate in this manner. And by specifically stating that the government is to be affected as a private individual, if there is this result under the application of a particular statute such as §2401(b), then that statute cannot be so applied in the face of the directive of the Congress. Congress has the right to legislate and give the remedy involved, the courts do not have the power to alter,

modify, or so interpret any statute as to deny that remedy afforded by Congress acting under its legislative authority.

If, in attempting to construe §2401(b) as a limitation upon §1346(b), (§2401(b) referring to tort claims, with a history of administrative claims), and the other §1346(b) being a new Act to give direct access by the citizens to the courts, to give the courts direct jurisdiction, if - to repeat - the application of such a statute results in any ambiguity or uncertainty, then the statute is not one so that men of ordinary understanding can apply it, and it should then be interpreted and applied so as to grant to the 40% of the population which would otherwise be excluded, the same remedy available to all; and if there is doubt as to the meaning of the qualifying portion of the statute as so applied, this doubt should be resolved so as to afford the remedy to all persons upon an equal basis. The statute of limitations should not and cannot be applied so as to deny a remedy; its sole function is to limit the exercise of the remedy within a period of time; by definition it is a limitation on the remedy and not a denial of it. A remedy is sham and delusive and is not available unless there is some period of time within which the persons injured has the right on his own behalf to recover as provided by the remedy.

VI.

ASSUMING §2401(b) IS THE SOLE STATUTE OF LIMITATIONS BEING APPLIED TO §1346(b), THEN A "CLAIM ACCRUES" AS TO A MINOR UPON THE APPOINTMENT OF A GUARDIAN, AND AT NO OTHER TIME.

As above, by law and by reason, a claim cannot accrue to a person under disability by reason of the law. The disability is imposed by the law itself. A right cannot accrue until a right can be asserted; by definition a claim is an assertion of a right, and a claim could not accrue until by definition the ability or capacity to make a claim existed. Since by law, State and Federal, there is no capacity to make a claim, and therefore it cannot accrue, until one legally able to act can make a claim, it must follow that in the instant case, the "claim accrued" under §2401(b) (and this does not agree that §2401(b) is the applicable statute), at the time that the father of the minor herein involved petitioned to become guardian, and was appointed as guardian. At the moment of appointment, someone with both the ability, and capacity to make a claim came into existence. At the moment of appointment the claim thus "accrued". The civil action being a tort claim, and no prior action by one endowed with capacity having been made, the action itself was validly filed.

In the event §2401(b) by application and construction, is construed to apply otherwise than as herein, it denies to the plaintiff the privileges and immunities, and the equal protection of the laws.

VII.

THE GOVERNMENT UPON APPOINTING A GUARDIAN BY LAW, IS ESTOPPED TO ASSERT A STATUTE OF LIMITATION AS TO A MINOR UNDER §2401(b).

Again by law, there was nobody with capacity to act, and the claim could not accrue, until the appointment of a guardian. The very act of the court in the proper exercise of its jurisdiction under 17c in the appointment of a guardian to protect the minor, acknowledged as a matter of law that there had not been anyone prior thereto, capable of making a claim on behalf of the minor or acting for the minor within the meaning of the law itself. Thus, this becomes res adjudicata as to the courts themselves. Now, having by judicial action upon a verified petition, by its Order, brought into existence a new legal entity to act by, for and on behalf of the minor, the court is estopped to assert that there was anyone theretofore in existence to act for said minor. Thus, the court acknowledges that prior to the time of appointment of the guardian, a claim could not have accrued on behalf of said minor because there was nobody in existence who had a right to act or to exercise a right of action in respect to such potential claim. Prior thereto it was a potential claim, whether with regard to damages accruing to the parent under California law and the minor having no right therein, or to a future claim of the minor which arises at age 21 under California law.

For the government through its courts, to take the position that the person appointed is the guardian, and is the legal representative of the government itself (as seen in cases cited above), and to

assert at the same time that now there is someone to make a claim where there was no one before, but the claim will not be permitted, is to deny to the plaintiff the privileges and immunities of the Constitution of the United States and the equal protection of its laws, and thus to deny him due process in his right to redress and recovery for wrongs done him by the government under §1346(b).

CONCLUSIONS

1. It is apparent that §2401(a) is the proper statute of limitation when the statutes are construed together.

2. It is apparent that §2401(b) applies to administrative claims, and its language is inapplicable as applied to §1346(b), since it applies to "tort claims" as distinct from civil actions sounding in tort for money damages, etc.

3. However, assuming even the application of §2401(b) to §1346(b), by interpretation or whatever means, it could have no application to the minor herein since a claim could not accrue to him until age 21, lacking capacity, ability and the right of action thereon -- whether by a suit on a claim (§2401(b)) or a suit reciting a claim (§1346(b) and §2401(a)).

4. That, therefore, assuming §2401(b) applicable, the action herein was commenced within two years after the claim accrued; to deny this is to deny due process.

5. ADDITIONALLY, THE GOVERNMENT BY ITS ACTION IN RECOGNIZING THE GUARDIAN, IS ESTOPPED TO ASSERT

THAT THE CLAIM COULD HAVE ACCRUED PRIOR TO THE DATE OF THE APPOINTMENT OF SOMEBODY ENDOWED WITH LEGAL CAPACITY TO ACT FOR THE MINOR.

The conclusion must, therefore, be reached that whether by application of §2401(a), the institution of a civil action within six years from the date of the cause of action (claim accrued within §2401(a), arose, or whether by the institution of a civil action on a "tort claim" within two years after the "claim accrued" (within §2401(b)) regardless of which clause is applied with relation of §1346(b), the suit was timely filed, it states a claim upon which relief can be granted, and the court below had jurisdiction. The Order of Dismissal or Judgment or Dismissal, as the case may be, should be vacated, set aside and reversed with instructions. If this is not so, then over 70 million people, comprising more than 40% of the population, together with the plaintiff herein, are denied due process of law. It is submitted, respectfully, that if the purpose of the Congress of the United States, in exercising its proper legislative function, intended to provide an elimination for the necessity of bills and petitions in Congress, and did it in such manner that those who are most likely to be injured in the Country are not protected, that is to say, those under 21, it is a highly unusual exercise of a proper legislative intent. The Court will take judicial notice of the statistics with respect to the occurrence of injuries and accidents in this Country, the insurance rates with respect to minors and the incidence of injury to minors as compared to those over 21; an anomolous condition such as this can only result from a strained interpretation and

tortured construction of the meaning and intent of limitation language imposed upon §1346(b). It is submitted that the intent of §1346(b) is clear, and that is to provide a remedy by direct access to all on the same basis. Not all "within a class" but "all". If the intent was to relieve Congress of petitions and bills for redress, this intent can only be effectuated by giving the statute the full reasonable range of its application. To deny this to over 40% of the people means that Congress intended only to relieve itself of bills and petitions from 60% of the people and not from the other 40%. It is respectfully submitted this just could not be so. And to interpret or apply a statute of limitation, which is not clear on its face, and the language, leave doubts and ambiguity, is an unfair and unjust application as to this plaintiff and as to the class of persons of which he is a part. Additionally, to so interpret it so that within the class of persons of which plaintiff is a part some have access to remedy where others do not, depending upon the good fortune of being injured within a two year age period prior to 21, thus heaping inequality upon inequality, certainly could not have been the intent of Congress.

For the reasons given, it is respectfully urged that notwithstanding any interpretation or application which may have heretofore been made, the Court below be reversed.

To predicate §2401(b) as a statute of limitation upon the basis of sovereign immunity, in the face of the specific waiver in §1346(b), is in and of itself violative of the legislative power in its express Act. One must read §1346(b) together with §2401(b); at that reading it becomes clear that it could not have been the intent of §1346(b) to

waive sovereign immunity and at the same time not to waive sovereign immunity. However, if one reads §1346(b) together with §2401(a), then there are no doubts, no questions with respect to construction, and the law is clear, just, and applies equally to all.

THE THIRD QUESTION

SUMMARY OF ARGUMENT

The Affidavit (R. 40-50) discloses that various representations were made by an officer of the United States Government to the affiant. They were made with express knowledge of the position of affiant. They were made with knowledge of all of the facts as set forth in the affidavit, which actually constitute all of the facts in the case. They were made in answer to affiant's questions addressed to that arm of the government which would be expert with respect to the matters involved.

A Deputy United States Attorney in the course of his functions, made certain representation and explanations with respect to the same. There is no question as to the wilfullness of such representations -- they were not wilful. They were in error.

As a result of these representations, which were in error, and which were apparently negligently made, affiant acted in the manner set forth in the affidavit.

By this question it is not intended to waive, set aside, or agree that the position of plaintiff with respect to the preceding two questions is altered in any regard. The position of plaintiff in this

question is that notwithstanding any other right plaintiff may have, the government is estopped to assert any statute of limitations whatsoever, no matter how construed, so that the jurisdiction of the court cannot be invoked by the plaintiff for relief.

I.

THE GOVERNMENT IS ESTOPPED.

Under §2680(h) of Title 28, it has been held (Hungerford, Jr. v. United States of America, CCA 9th Cir., 307 F. 2d 99, at page 102):

> "An incorrect representation is a 'misrepresentation' within the meaning of the statute, whether wilful OR BASED UPON NEGLIGENCE IN ASCERTAINING THE FACTS PRESENTED." (Emphasis added). (Citing United States v. Neustadt, 366 U.S. 696, 702, 81 Sup. Ct. 1294, 6 L. Ed. 2d 614).

The affidavit of record discloses that every fact upon which reliance was based was set forth. The only thing not included was the name of the United States Attorney. This was for humanitarian reasons and specifically set forth in the affidavit that it was withheld so the court could determine from the facts whether there was an estoppel; that if the court felt that the name should be disclosed as a fact upon which estoppel was to be determined, that in such case the name would be disclosed.

It is apparent from the language of the court's ruling, that the reason the court did not permit an estoppel was predicated upon the failure to include the name of the United States Deputy Attorney General involved. It is urged that this was an improper

application of the doctrine of estoppel in view of the offer contained in the affidavit itself that the name would be disclosed if the court determined this was necessary for a determination of the question of estoppel.

Therefore, under the circumstances recited herein, under Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 3 L. Ed. 2d 770, 79 Sup. Ct. 760 (1959), and under the Hungerford case (supra), there is a sufficient misrepresentation so as to constitute an estoppel. The government knows that persons, including other attorneys, call the government Deputy Attorneys General for information based upon expertise; and the government knows that the government represents the People, including the people through their attorneys who call the Deputy Attorney. They know there is reliance; they know there is a reasonable ground for reliance. There is no duty upon the part of the United States Attorney General to give information. However, if it gives it, he should give it correctly, and if he does not give it correctly but is negligent in the same, this constitutes a misrepresentation and the government is estopped to assert defenses otherwise available to it.

CONCLUSION

Therefore, by reason of the matters recited, and without regard to whether §2401(a) or §2401(b) is a statute of limitations, and without regard to the constitutionality, interpretation or application of either or both with respect to §1346(b), the conclusion must

be reached that the government is estopped to assert any statute of limitations as a defense in this case.

A FOURTH QUESTION

APPLICATION OF THE DOCTRINE OF SOVEREIGN IMMUNITY IN THIS CASE.

It is the position of the plaintiff in this case that by reason of the phraseology of §1346(b), an assertion of the doctrine of sovereign immunity in applying §2401(b) as a statute of limitations is unconstitutional, and thus does violence to the intent and language of §1346(b) itself.

Section 1346(b) states: "... under circumstances where the United States, if a private person, would be liable to the claimant IN ACCORDANCE WITH THE LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED." (Emphasis added).

IT HAS BEEN SQUARELY DECIDED IN THE STATE OF CALIFORNIA THAT THE DOCTRINE OF SOVEREIGN IMMUNITY HAS NO APPLICATION TO TORT INJURIES AS A DEFENSE OR A LIMITATION WITH RESPECT THERETO. IN MUSKOPF v. CORNING HOSPITAL DISTRICT, 55 Cal. 2d 211, AN EXHAUSTIVE EXAMINATION WAS MADE OF THE DOCTRINE OF SOVEREIGN IMMUNITY. THE CONCLUSION REACHED WAS THAT THE DOCTRINE WAS INAPPLICABLE IN A GOVERNMENT SUCH AS OURS, THAT IT HAD NO VALIDITY OR APPLICATION OR EXISTENCE, AND THAT THEREFORE THE DOCTRINE OF

SOVEREIGN IMMUNITY IN THE STATE OF CALIFORNIA WAS NO LONGER THE LAW.

Since §1346(b) directly states that the government would have liability as a private person in accordance with the laws of the state where the accident happened, it is perfectly clear that the government is liable in the State of California for the wrongdoing herein, and, the doctrine of governmental immunity no longer existing in the State of California as to the plaintiff who suffered injury within that state, the doctrine has no application. The doctrine of governmental immunity is one of substance, and not merely of procedure. It goes to remedies, and not to procedural rights such as statutes of limitation. Since it goes to remedies, and since it is stated to apply to the remedies as afforded in the state wherein the accident occurred, it follows as a matter of law, that this injury herein having occurred in the State of California, the doctrine of sovereign immunity cannot be interposed as a defense to limit the right of action which otherwise a plaintiff would have.

GENERAL CONCLUSIONS

It is respectfully submitted that the District Courts of the United States have jurisdiction of the matters in this case; that a person has been legally appointed under Rule 17c to exercise a right of action which did not theretofore exist, and to state a claim in such civil action over which the Court has jurisdiction expressly by reason of the provisions of 28 U. S. C. §1346(b); that the Orders of

the court heretofore made should be reversed, set aside, and the court below be instructed to take jurisdiction and permit plaintiff to proceed; that the Orders of the court quashing the interrogatories, and quashing and denying notices of motions to take depositions, should, in turn, each of them be vacated, set aside, and the Interrogatories and Notices with respect to depositions ruled to be validly made.

Respectfully submitted,

/s/ Edward B. Freed

EDWARD B. FREED

Attorney for Appellant.

CERTIFICATE

I, certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward B. Freed

EDWARD B. FREED